

Motion Practice Using Notice and Hearing
Under the Local Bankruptcy Rules

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In the beginning . . . there was Rule 23.

Rule 23 begat Rule 202.

Rule 202 begat . . .

Due process is fundamental to the effectiveness of the Court's actions; and notice and an opportunity to be heard are fundamental to due process. The current Rule 202 embodies the mechanism through which parties seek to satisfy the notice and opportunity for hearing requirements of due process in motion practice before the Court.

For most motions, Rule 202, in combination with related Federal Rules of Bankruptcy Procedure, set out a procedure for a movant: to serve the motion and notice on the proper parties; to set a response deadline; to expeditiously obtain an order if the matter is not contested; or to obtain a hearing if the matter requires a ruling from the Court. New local rules 9013-1, 9014-1 and 2002-1 do the same. They do not represent a fundamental change to that process.

In the 10 years since the last local rule revision:

1. The Court has adopted electronic filing;
2. The Judicial Conference Uniform Numbering System for Local Bankruptcy Court Rules has been promulgated and refined to standardize local rule numbers for particular topics nationwide;
3. BAPCPA was enacted;
4. There have been yearly phased revisions to the federal rules starting on December 1, 2007, and culminating on December 1, 2009; and
5. The time Computation Project, conducted by the Judicial Conference's Rules Committee, has resulted in time computation changes across the board to federal rules and statutes that will take effect on December 1, 2009. Those changes are aimed at simplifying time computation issues.

The local rule revisions take all of the above into account.

Local Bankruptcy Rule 9013-1

The primary change to the motion and notice procedures is simply one of placement within the new local rules. The meat of those procedures has been placed in the new rule 9013-1. Under the new Uniform Numbering System, Rule 9013-1 is the rule that addresses Motion Practice. Reference is also made to the new Rule 2002-1 which addresses Notice to Creditors & Other Interested Parties; new Rule 9013-2, Certificate of Service - Motions; and new Rule 9014-1, Contested Matters. The new Rule 9013-1 also reflects some organizational and

language changes that are intended to make the rule as user-friendly as possible. In recognition of the fact that many motions do not have prescribed notice periods elsewhere in the Code or the federal rules, new Rule 9013-1 contains a standard 14 day notice period where the notice period is not otherwise set.

Consideration was given to placing the motion and notice procedures in the new Rule 2002-1, consistent with the current organization or placing notice specific provisions in new Rule 2002-1 and motion practice specific provisions in new Rule 9013-1. The new Rule 9013-1 was chosen to be more consistent with other districts around the country and with the apparent intent of the new Uniform Numbering System. Also, after a number of drafts, we decided to keep the motion practice and noticing provisions primarily in a single rule instead of dividing them.

New Rule 9013-1 does the following:

1. Rule 9013-1 specifies the documents to be served on the parties against whom relief is sought:
 - a. motion,
 - b. notice, and
 - c. proposed order.
2. Rule 9013-1 specifies the mode of service on parties against whom relief is requested by reference to Rule 7004 & 9014 FRBP.
 - a. Rule 9014 simply provides that service of contested matters is in accordance with Rule 7004.
 - b. In bankruptcy matters, Rule 7004 allows nationwide service by mail.
 - c. But special care is necessary where service on a corporation or depository institution is involved; otherwise, the resulting order may be found to be void if collaterally attacked on the basis of improper service.
3. Rule 9013-1 specifies the form of notice to conform to the local form 9013-1.1.
 - a. That notice form has been modified slightly to accentuate the objection deadline.
 - b. Otherwise the language of the notice form is very similar to the current Rule 202.1 notice form.
4. Rule 9013-1 requires the notice to include a deadline by which to object to the relief and request a hearing.
 - a. The rule defers to the Code, the federal rules or other sections of the local rules if a notice time period is specified in one of those sources.

- b. If no notice period is otherwise specified, the default notice period is 14 days.
 - c. The notice itself must contain a date certain by which to object as opposed to a number of days (more about the date certain requirement later).
- 5. Rule 9013-1 continues the procedure to request Court action by filing either a Certificate of Non-Contested Matter (Form 9013-1.3) or Certificate of Contested Matter (Form 9013-1.4). That is substantially identical to current procedure.
 - a. The Certificate of Non-Contested Matter form has been revised to incorporate requirements for attachments formerly appearing in the rule itself.
 - b. A similar revision was made to the form for the Certificate of Contested Matter. In addition, the filer is requested to provide information regarding:
 - i. the factual issues requiring hearing;
 - ii. the time estimate for a hearing;
 - iii. the number of witnesses anticipated;
 - iv. the need for expert testimony; and
 - v. discovery needs.
 - c. Although the rule still provides that either the movant or the respondent may file the Certificate of Contested Matter, under the revised rules the same form will be used regardless of which party files it.
 - d. Both forms require the Movant to verify that service has been properly made under the rules on the parties against whom relief is sought and that notice has been given to parties entitled to notice. The intent of those provisions is to focus attention on these important due process requirements and to substantially remove the Court from checking service in all cases. However, the Clerk will continue to do random spot checks to monitor service.
- 6. Rule 9013-1 still provides that the Court will give notice of the hearing date and time when a Certificate of Contested Matter is filed. As is the current practice, the Court's hearing notice will indicate whether the hearing is to be evidentiary or non-evidentiary.
- 7. The new form of Certificate of Service for motions (Form 9013-1.2) contains two separate certificates.
 - a. The first shows only the parties against whom the relief is sought and attests that the motion, notice and order were served on those parties.
 - b. The second certificate shows all of the remaining interested parties who received the notice only.
 - c. That revision emphasizes that nothing more than the notice needs to go to parties other than those against whom relief is requested. More

importantly, it lets the Court know which parties did get full service of the motion, notice and proposed order and which parties just received the notice.

- d. Except for those a limited number of actions listed in Rule 2002 FRBP, notice of a motion need not go to all creditors.

Local Rule 9014-1

New Rule 9014-1 is short and sweet. It does nothing more than refer back to new Rule 9013-1 for detailed motion and notice procedures applicable to contested matters. The substance of the current Rule 914, which addresses discovery in contested matters, has been shifted to the discovery rules in new Rule 7026-2.

Local Rule 2002-1

New Rule 2002-1 contains only a few of the notice-specific rules.

1. It refers the reader to new Form 9013-1.1 for notice content.
2. It emphasizes that the notice needs to contain a detailed statement of the relief sought in the motion.
3. It refers to Rule 2002(c) FRBP where specific content guidance is given for notices relating to certain motions.
4. It provides that notice deadlines must be given in terms of a date certain rather than a number of days. A date certain avoids any consideration of whether the 3 day mailing rule in Rule 9006(f) FRBP applies.
 - a. The 3 day mailing rule has previously been interpreted expansively in our district.
 - i. Its application should be limited to deadlines stated as a number of days *after service* when service is by mail. Most commonly these types of deadlines are found in rules applicable to adversary procedures such as:
 - (1) an answer to a cross-claim or counterclaim is due 20 days after service;
 - (2) a responsive pleading is due 10 days after notice that a Rule 12(b) motion has been denied; and
 - (3) responses to admission requests, document requests and interrogatories are due 30 days after service.
 - ii. It does not apply, for example, to
 - (1) an act to be done by a date certain (such as a claims bar date where the notice is served by mail);

- (2) an act to be done within a number of days from the date of a court order (such as the date for filing an appeal where the order is served by mail); or
 - (3) an act to be done within a number of days from the date a paper is filed (such as filing a responsive brief within 10 days after the initial brief in support is filed with the court).
- iii. In essence, Rule 9006(f) creates a presumptive “service” date, where service is by mail, by adding 3 days to the date of mailing; but that is of no consequence except when the recipient is directed to act within so many days from “service.”
- b. We wanted to eliminate the potential of confusion over the applicability of Rule 9006(f) by simply avoiding the use of a number of days in the notice.
- c. While use of a date certain in the notice is no real departure from current local practice, the method of determining that date does change local practice. The current Rule 202 notice form contains a commentary advising users to add 3 days to the Rule 2002 notice periods. We have concluded that is not necessary and that, in fact, the practice should be discontinued in light of pending changes to Rule 9006(a) F.R.B.P (Rule 6 F.R.C.P.).
 - i. The few cases where that issue has been presented reject the application of Rule 9006(f) to extend the Rule 2002 notice periods where recipients are given a date certain in the notice to respond or otherwise act.¹
 - ii. The new national rules change Rule 2002 notice periods and others to multiples of 7 days.
 - (1) The rationale for that is to minimize occasions where a deadline falls on a weekend.
 - (2) The purpose of the new time computation changes would be frustrated if we continue to add 3 days to the notice periods stated in the rules. For example, any notice mailed

¹ *In re: Robintech, Inc.*, 863 F.2d 393 (5th Cir. 1989) (reversed lower courts that held the creditor was not allowed sufficient notice of the bar date under Rule 2002(a)(7) because 3 days was not added to the 20 days under rule 2002(a)(7) as required by Rule 9006(f)); *Bryant v. Smith*, 165 B.R. 176, 180 (W.D. Va. 1994) (rejected a debtor’s claim that the § 341 meeting notice was defective because the clerk failed to add 3 days under Rule 9006(f) to the Rule 2002(a)(1) meeting notice period); *In re Whitten*, 49 B.R. 220, 221 (Bankr. N.D. Ala. 1985) (rejects applying 9006(f) to extend date set in bar date notice for filing proof of claim); *but see, In re Pettibone Corp.*, 123 B.R. 304, 308 (Bankr. N.D. Ill. 1990) (“A creditor is entitled to at least 23 days notice of the claims bar date when such notice is mailed.”) (This is unpersuasive authority because it relies on the bankruptcy court opinion that was reversed by the 5th Circuit in *Robintech*.).

- on a Wednesday or Thursday, where 3 days is added to the 14, 21 or 28 day notice period, results in a deadline falling on the weekend. This is exactly what the Rules Committee of the Judicial Conference seeks to avoid with the extensive national rule revisions.
- (3) Effective December 1, 2009, time computation changes will take effect with respect to 91 national court rules and 28 federal statutes. The changes affect all aspects of federal practice and procedure – not just bankruptcy practice.
 - (4) Our current practice is at odds with the extensive time computation changes to the new national rules. Continued use of that practice after December 1, 2009, would serve to undermine the national rule revisions by adding unnecessary complexity to a noticing process that the rule revisions seek to simplify.
5. Finally, Rule 2002-1 provides that the Court's mailing matrix is the source of names and addresses of creditors and parties in interest.
- a. The Creditor Address Mailing Matrix is a defined term in new Rule 9001-1 which refers the reader to instructions for accessing the Court's mailing matrix through CM/ECF.
 - b. The notice address appearing in the mailing matrix must not be confused with what is necessary to satisfy service requirements on the parties against whom relief is requested under Rule 7004. Merely mailing to the notice address is unlikely to satisfy Rule 7004 requirements for serving parties such as corporations or depository institutions.

Revised National Rule 9006

The national Time Computation Project, conducted by the Rules Committee of the Judicial Conference, has resulted in extensive revisions to Rule 6 and its bankruptcy counterpart, Rule 9006, as well as numerous other federal rules and statutes that refer to time periods in which a party must act. Those revisions take effect on December 1, 2009. The Time Computation Project adopted a "days are days" approach that has resulted in scrapping the division in the rule between the treatment of short time periods and longer time periods. Currently, the rule provides that intervening weekends and holidays are not counted in calculating deadlines where the notice time period is less than 8 days. Those days are counted for time periods of 8 days or more. Under the new approach, all days are counted. Period.

The other issue the Rules Committee sought to address was the problem of deadlines falling on weekends. In concept, it was an easy fix. Simply change all deadline time periods to multiples of 7 days. That way, whatever day of the week that a notice is mailed is the day of the

week that the deadline falls on. Any notice mailed out Monday through Friday results in a deadline falling on a Monday through Friday. Of course, that simple fix resulted in revisions to 91 national court rules and 28 federal statutes. In addition, all U.S. Courts have been asked to revise time periods appearing in local rules to multiples of 7 days and make those changes effective on December 1, 2009. The Committee Note following all of the revised national bankruptcy rules reads as follows:

The rule is amended to implement changes in connection with the amendment to Rule 9006(a) and the manner by which time is computed under the rules. The deadlines in the rule are amended to substitute a deadline that is a multiple of seven days. Throughout the rules, deadlines are amended in the following manner:

- 5-day periods become 7-day periods
- 10-day periods become 14-day periods
- 15-day periods become 14-day periods
- 20-day periods become 21 -day periods
- 25-day periods become 28-day periods

Although Rule 9006 is a total revision, the rule for counting days is the same as it has always been for periods 8 days or greater but now that rule applies to all time periods across the board. The same method applies to time periods stated in weeks, months or years. Also, there is a new provision for counting response times that run in hours. In that case, the clock starts running “immediately on the occurrence of the event that triggers the period.”

The Rule 9006 time computation rules apply to any time period in a rule or statute except for those that state the method for calculating the time period. For example, because 11 U.S.C. § 527(a)(2) contains a provision that debt relief agencies must provide a written notice to an assisted person “not later than 3 business days” after providing bankruptcy assistance services, its specific time calculation rule is unchanged. Similarly, our new local rules contain some short deadlines stated in “court days” prior to a hearing or following an event. Those periods are not affected by the revised time calculation rules.

The commentary to the revised Rule 9006 notes that

[t]he time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc.*, 427 F.3d 1015, 1016 (6th Cir. 2005) . . . and reject the contrary holding of *In re American Healthcare Management, Inc.*, 900 F.2d 827, 832 (5th Cir. 1990) If, for example, the date for filing is “no later than November 1, 2007,” subdivision (a) does not govern. But if a filing is required to be made “within 10

days” or “within 72 hours,” subdivision (a) describes how that deadline is computed.

This is significant. Both cases deal with issues involving court orders that set a date certain for making a response. In both cases the date set fell on a weekend when the court was not open for filing. The earlier *American Healthcare* case applied Rule 9006(a) and found that the deadline did not run until the following business day. The Rules Committee rejects this approach in favor of the *Violette* holding that Rule 6(a) does not extend a date certain deadline to the following business day.

Rule 9006(a) only provides the formula for a party to calculate a response date where they are given a number of days to respond and, under Rule 9006(a), where the calculation results in the deadline falling on a Saturday or Sunday, then the rule provides an extension to the next business day. But, the extension provision in Rule 9006(a) is inapplicable where the deadline is stated as a date certain. That means the party who needs to respond must be conscious of whether the date falls on a weekend. If so, he must file a response by the next *prior* business day (i.e. the Friday *before* the weekend deadline) or risk filing out of time.

It is likely that many practitioners, like the 5th Circuit, assume that Rule 9006(a) applies to extend date certain deadlines to the following business day. By endorsing the *Violette* holding that strictly limits Rule 9006’s scope to circumstances where the responding party must calculate the deadline, many attorneys may be caught by surprise. The revisions of notice periods to multiples of 7 days will minimize the occasions when those types of timeliness issues arise. Also, the new Rule 9013-1 provides that the date certain deadline a movant chooses for his notice should fall on a day when the Court is scheduled to be open for business and discontinuing our local practice of adding 3 days to rule 2002 notice periods will greatly diminish the occasions when a deadline may inadvertently fall on a weekend.

The effect of legal holidays has been changed somewhat in the revised Rule 9006. Specifically, state holidays are recognized when counting forward from an event to the deadline but are disregarded in counting backwards. So, in counting forward from an event to a deadline, when the deadline falls on a state holiday, it is extended to the next date that is not a weekend or holiday even though the courthouse is open because the date is not a federal holiday. But, where the deadline is calculated by counting backward, such as a deadline for filing a trial brief 3 days before a hearing, the state holiday is disregarded. The effect is that the filing party always gets the benefit of any uncertainty with regard to treatment of the state holiday.

CONCLUSION

A lot of rule changes go into effect on December 1, 2009. Not the least of those changes are the revisions to our local rules. With respect to noticing concepts in our local rules, you will certainly observe changes in appearance and placement. There are also some limited changes in the details of the procedures, but the overall design of the process is unchanged. You will also see, because of the time computation changes on the national level and the conforming changes

in local rules, that the actual noticing time periods have virtually all changed. Finally, even though the issue should rarely arise, practitioners need to be aware that, in revising Rule 9006, the Rules Committee of the Judicial Conference has endorsed the case law that finds the application of Rule 9006 is limited such that a date certain deadline that falls on a weekend or holiday is not extended and, to be timely, the filing must be done on the next prior court day.